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IN THE

Supreme Court of the United States

October Term, 1954

No. 735

JANE FROMAN,

Petitioner,

v.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

(A)

The judgment sought to be reviewed involves an erroneous interpretation of Article 3 (1) of the Warsaw Convention, dealing with delivery of a ticket and is not a determination of a question of fact as to the existence of agency or ratification.

(B)

The holding by the Court of Appeals, that the Government of the United States was not performing petitioner's transportation, within the meaning of the United States reservation to Article 2 (1), and the additional protocol thereto, is erroneous and requires independent determination by this Court.

(C)

There is presented, here, an adjudication by a State Court interpreting the terms of a Federal Treaty, involving a Federal question of substance not theretofore determined by this Court.

(A)

Respondent contends, that the prevailing opinion of the Court of Appeals, rests upon a finding of fact, that petitioner ratified the acts of the Army or of the U.S.O. in procuring a ticket in her name, and therefore, the determination does not involve a construction of the provisions of the Warsaw Convention.

If that were so, it could find no support in the record at bar, for respondent's sole allegation of fact, is that its traffic agent, "was instructed to prepare reservation sheets for a number of passengers who were scheduled to depart from New York on a round trip flight to the United Kingdom and return to New York for the purpose of entertaining soldiers in the European area under management of U.S.O. Camp Shows, Inc." (fol. 66).

The record at bar contains no other factual allegations from the respondent in any wise, connecting petitioner with said instructions or with any subsequent acts of ratification. There is, however, specific allegations by the petitioner that she did not contract for any passage, had no knowledge of her destination until after she had boarded the plane and did not receive delivery of a passage ticket nor had she any knowledge of the ticket provisions for international transportation and the resulting limitation of liability (fols. 117-120, 125-130), all of which was not put in issue, as a fact, by respondent.

More so, the prevailing opinion indicates quite clearly that its holding was based upon a strict legal construction of the delivery provisions of Article 3, of the Warsaw Convention, for it states (Petition, pp. 16 to 18):

> * * * "There is, of course, no affirmative showing here of any specific instruction from appellant

to Abraham accrediting him to act for her in respect to this particular kind of ticket or any ticket." * * *

* * * "Plaintiff, of course, was presumed to know the law, and was bound thereby. Furthermore, while the Convention speaks of transportation under a 'contract' and requires delivery of a ticket warning of the limitation, it is plain that the limitation is one created by the Convention itself, and is not the product of consensual arrangements between the parties. Paragraph (2) of Article 1, in its reference to 'the contract made by the parties' means, obviously and on its face, not that the Convention applies only when the parties contract for its application, but that it applies (unless by special arrangement otherwise) whenever, 'according to the contract made by the parties', the place of departure and the place of ultimate destination are within the territories of two of the 'High Contracting Parties' or both within the territory of a 'single High Contracting Party' with certain agreed stopping places elsewhere." * * *

* * * "The requirement of Article 3 of the Convention, quoted in the third paragraph of this opinion, that there must be delivery of a ticket is thus a condition set up by the Convention itself, as a detriment of the applicability, or no, of the Convention's limited liability rules: but that is by no means the same thing as saying that the limitation is a contractual one, depending for its existence and validity on express assent thereto by the passenger. Since the Convention itself, as a statute, grants and mandates the limitation unless 'the carrier accepts a passenger without a passenger ticket having been delivered', *there is no need for a car-*

rier who claims the limitation to show more than the delivery of an appropriate ticket, and travel of the passenger thereunder." * * * (Italics ours.)

In other words, the Court of Appeals holding is, that delivery to the passenger or his agent is not required. That is, delivery could be made to anyone or not at all, providing the carrier issues the ticket for "international transportation" and the passenger enters upon the plane and is transported.

We submit that to be the core of the Court of Appeals determination and that it constitutes a drastic extension of the provisions of the Convention.

We submit further, that if the Court of Appeals determination can be said to be a finding of law, that acceptance of transportation upon this plane, as disclosed by the record, constituted a ratification by petitioner to the creation of a contract for "international transportation" with limitation of liability, then the determination is completely erroneous.

As was indicated by Judge Conway in his dissenting opinion, ratification connotes full knowledge of all material facts as to the contract alleged to have been entered into on the principal's behalf. (See, *Smith* v. *Kidd*, 68 N. Y. 130, 142; Mechem's on Agency, Sections 725, 726; The Majestic, 166 U. S. 375; *Saunders* v. *Southern Railway Co.*, 128 Fed. 15.) The record at bar does not disclose one scintilla of evidence that petitioner had any knowledge of her intended destination or that she was about to be transported under a contract for "international transportation".

We submit, that the dissenting opinion by Judge Conway on this issue, is correct (Petition, pp. 33, 36-7):

> * * * "In order for defendant to prevail on this motion, it was required to show as a matter of law that appellant authorized someone to enter into a contract in her name for 'international transportation' within the meaning of the Warsaw Convention and that she authorized someone to accept delivery of a ticket for her for such transportation." * * *
>
> * * * "In our opinion the aims and intendments of the Warsaw Convention and the protection of our own residents are best served by refusing summary judgment drastically limiting liability except upon proof that 'international transportation' was contracted for by the passenger or her duly authorized agent and that a ticket was delivered, with the particulars required by the Warsaw Convention printed thereon to the passenger or his or her duly authorized agent. The airlines have been given the utmost consideration as against the passengers they are paid to transport. At least they should be held sharply to the doing of the few acts which are required by the Warsaw Convention in return for the consideration granted them." * * *

It is clear therefor, that the Court of Appeals determination is "not only without fair support in the evidence but that the evidence conclusively refutes it", and is contrary to law, so that the decree deprives the petitioner of a federal right on a non-federal ground of decision (*Ancient Egyptian Arabic Order* v. *Michaux*, 279 U. S. 737).

(B)

The prevailing opinion, upon the issue of whether the United States Government performed petitioner's transportation, states (Petition, p. 20):

> * * * "Taking either wording of the reservation, it is plain that the appellant's transportation was not 'performed by the United States'. The United States Army, apparently, bought appellant's ticket but her transportation was, as she herself alleged in paragraph Fourth of her complaint here, on an aircraft 'owned, operated and controlled by the defendant'." * * *

Respondent also argues (respondent's brief, p. 13), "Quite obviously, all of these provisions have reference to the carrier who has actual physical control over the operation of the flight, and not to a person or agency who may have 'made the arrangements' for the transportation."

The prevailing opinion of the Court of Appeals and the respondent completely lose sight, that the provisions of the "Warsaw Convention", deal with the transportation of passengers, involved in "international transportation" and not with the operation and control of planes engaged in "international transportation".

Thus, the fact, that the plane was operated by respondent does not determine the question as to whether the government was performing petitioner's transportation.

Petitioner and others were engaged in a governmental project, rendering entertainment to the United States Armed Forces.

The word *performance* as used in the reservation to the convention should be construed in a broad sense. The government was performing this transportation, just as it would have, if it were transporting military personnel under a charter contract with respondent with no special contract of liability for injury. In such event respond-

ent's obligations for injuries would be measured by the law of the place where the injury occurred and not by the limitation provisions of the "Warsaw Convention".

It is reasonable to assume that reservation by the United States was intended to limit the application of the articles of the convention to private transportation, for, it was a treaty intended to govern the rights of citizens and not the rights of nations. At least, those are the terms under which the United States adhered.

Why then, should this governmental project for transportation connected with the war effort, concerning which those being transported had no knowledge or choice of contract, be said to come within the framework of a compact intended to apply to private citizens having the choice and power to contract freely.

Judge Conway, in his dissenting opinion, deemed the question as one of fact to be determined at a trial. He said (Petition, p. 35):

> * * * "Since the War Department was arranging her transportation to war areas she may have reasonably assumed and may be able to prove that the Government was "performing" the transportation in such a manner that the Convention was inoperative. Defendant's proof is certainly not conclusive that appellant knew or should have known that the War Department had purchased a passenger ticket for her for 'international transportation' on a privately operated commercial airline. The arrangement between the Government and the defendant may well have been such that the Governmen was 'performing' the transportation within the meaning of the reservation to the Convention. That is for the trial."

(C)

The delivery of a ticket to the passenger with the terms of limitation printed thereon, were evidently intended by the framers of the "Warsaw Convention" to give some type of notice to those who were to be bound thereby. The determination of the Court of Appeals destroys the provision for notice.

To say, that a situation like the one at bar is not likely to occur again because the type of transportation involved here, was peculiar to wartime conditions is to ignore the fact that wartime conditions still prevail; that the government transports many thousands in peacetime; that private transportation is continually affected by the delivery provision of the Convention.

There are few questions involving greater public concern, than those presented by the petition at bar.

This petition meets every condition prescribed by Rule 19 of the Supreme Court Rules and is not adversely affected by the decision of this Court in *Evelyn Rice* v. *Sioux City Memorial Park Cemetery, Inc., et al.*, decided May 9, 1955.

CONCLUSION

The petition should be granted.

Dated May 18, 1955.

Respectfully submitted,

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